No. 5815

United States Circuit Court of Appeals

For the Ninth Circuit

WILLIAM L. PAUL,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Brief of William L. Paul

Appellant.

Upon Appeal from the United States District Court for the Territory of Alaska, Division No. I.

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A.

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A. STATEMENT OF FACTS IN THE CASE.

SUMMARY.

William L. Paul, the appellant in this case, is a resident of Ketchikan, Alaska, a young member of the bar, and has practiced law for nearly ten years. He is a married man, of southeastern Alaska mixed Indian blood, and of good character.

He presented a petition to bring up for review a judgment of a justice of the peace in the Craig Precinct, wherein a fine of $400.00 was imposed upon Maxfield Dalton, one of his Indian clients, for illegal fishing, and this expression was contained therein:

> "(3) That the plea of guilty was forced from your petitioner and was not a voluntary plea, so that he entered the said plea under threat of the United States Attorney that expensive and dilatory proceedings in admiralty would be started if the said plea was not entered."

This petition was sent by United States mail to Judge Harding in Juneau chambers, to approve the bond and make the order allowing the writ, "in order that the matter may come up before Judge Hill next March." It appears that Judge Harding assumed that he was the United States Attorney mentioned in the above excerpt, and he set on foot contempt proceedings before himself, and himself tried the case and fined Mr. Paul $75.00 on one count and $100.00 on another, for contempt of court. The appeal comes to this court on constitutional grounds.

1. THE FISHERMEN'S CRIME.

Maxfield Dalton is an Indian fisherman and was the only witness called by the government. We think he told the truth as far as his very limited understanding and use of the English language permitted him to do so. We do, however, specially call the attention of the appellate court to the incomplete and fragmentary statement of facts contained in his testimony (owing to his being skilfully "led" by the District Attorney), to his want of understanding of the meaning of the strange language addressed to him and his inability to express his own thoughts in English.

Dalton testified that on the morning of August 17, 1928, he was in charge of a small power boat belonging to his employer Bob Peratovich, an-

other Indian, which boat is named "DUBROVNIK," and was lying adrift in the bay of Klawock, Alaska, waiting for the hour of six o'clock A. M., that he and his crew of three other Indians might begin to fish for salmon.

Pages 9-10, Transcript.

August 27, 1928, was on Monday, and Section 5 of the Act of Congress approved June 6, 1924—43 Stat. L. 464—then provided that:

> "Sec. 5. It shall be unlawful to fish for, take, or kill any salmon of any species in any manner or by any means except by hand rod, spear, or gaff for personal use and not for sale or barter in any of the waters of Alaska over which the United States has jurisdiction from six o'clock post meridian of Saturday of each week until six o'clock ante meridian of the Monday following, or during such further closed time as may be declared by authority now or hereafter conferred, but such authority shall not be exercised to prohibit the taking of fish for local food requirements or for use as dog feed."

The basis then, of the criminal proceeding out of which this controversy arose was that clause in the above-quoted statute which provides that commercial fishing for salmon shall not begin before six o'clock Monday morning. (The record shows that there were two other boats and their crews detained at the same time and place with

that under charge of Dalton, and for the same alleged facts and offenses.)

Pages 32, 38-39 Transcript.

The record shows that there was confusion as to time, and the words "Sitka time" and "Seattle time" are used by Dalton in his testimony.

Page 11, Transcript.

This is explained by the fact that Klawock is officially in the standard meridional time of Sitka, Alaska, to which time the Bureau of Fisheries adheres; but for business convenience Ketchikan and contiguous territory, including the town of Klawock, use Seattle time. Thus when it is officially 5 o'clock the clocks and watches of the whole district show 6 o'clock.

The record shows further—page 17—that early that Monday morning, when the stream watchman, or "commissioner" as he was called by Dalton, came among the fishing boats in his skiff, he was civilly requested for the time and that he made a surly and insulting answer telling them to go to hell and fish by their own time.

These gentlemanly and peaceable Indian fishermen, seeking for the correct time that they might obey the law, waited until after six o'clock by their time, and then in the presence of the fish warden made their first "set." Thereupon that official took their names and later N. O. Hardy, Deputy

Fish commissioner, arrested the masters and crews of three boats including the "DUBROVNIK," and seized the boats, taking the fishermen and the boats to the town of Craig where the United States Commissioner and ex officio justice of the peace resides. Here began a very unfair official pressure to compel them to plead guilty and pay a fine of $400.00, threatening in the event they did not do so to take their boats to Juneau, some 200 miles away, to be proceeded against on the admiralty side of the District Court for forfeiture under Section 6 of the above cited Act of Congress.

Pages 10 and 32, Transcript.

The seizure of these three Indian boats was made under the provision of Section 6 of the Act of Congress above cited. That Section first provides a penalty against any person, company, corporation or association violating the Act, of a fine not to exceed $5,000.00, or imprisonment in jail for not more than 90 days, or both, and then provides:

> "Sec. 6. . . . Every boat, seine, net, trap, and every other gear and appliance used or employed in violation of this Act or in violation of said Act approved June 26, 1906, and all fish taken therein or therewith, shall be forfeited to the United States, and shall be seized and sold under the direction of the court in which the forfeiture is declared, at public auction, and the proceeds thereof, after

> deducting the expenses of such sale, shall be disposed of as other fines and forfeitures under the laws relating to Alaska. Proceedings for such forfeiture shall be in rem under the rules of admiralty."
>
> —43 Stat. L. 464.

It appears from the record that the boats were held in Craig, in the possession of the official watchman, from August 27 to September 2, both dates inclusive, (for some reason not clearly disclosed). On Sunday, September 2, as stated in the testimony of Dalton, the government's witness, "as soon as they got a letter"—page 12, Transcript —the justice of the peace held court, the defendant Dalton entered a plea of "guilty" and was fined $400.00 as agreed on to save the boats from being taken to Juneau for forfeiture, the fine was paid "under protest" and the fishermen and boats were released.

Pages 38-39 and 52, Transcript.

No evidence was offered by the prosecution in this case to deny the facts herein above stated; they stand admitted in the record.

2. THE TRIAL AT CRAIG.

There was no trial, as that term is commonly understood in an American court, at Craig. Under the threat made by officials in charge of the proceeding, that the boat would be taken to Juneau,

some 200 miles away, for forfeiture, the necessity for the defendant Dalton and other fishermen, and the owner, to go there as witnesses to protect the boat from such forfeiture was apparent; it was also a fact, of which the court will take judicial notice, that the bench of the First Division of the District of Alaska was vacant at that time, Judge Harding had not yet been appointed, so that no one knew when such a case might come to trial; to escape from these conditions the Indian defendants were compelled to and did agree that Dalton should enter a plea of guilty and pay a fine of $400.00, "under protest," without trial on the facts before the court or jury.

Page 32, 35 Transcript.

It should be noted that the Alaska statute does not require that justices of the peace shall be lawyers, and U. S. Commissioner Bagley is not a lawyer, but merely a reputable citizen doing his best to dispense justice.

In her testimony on this trial at Ketchikan, in the presence of Judge Harding, Mrs. William L. Paul, being sworn as a witness, under cross-examination testified as follows:

Page 35, Transcript (Testimony of Mrs. Wm. Paul).

"Cross examination. (By Mr. Stabler).

Q. Are you familiar with the petition?

A. Yes.

Q. You helped to prepare it? A. Yes.

Q. And investigated the facts on which it is based. A. Yes.

Q. Were you present in court at the time Maxfield Dalton entered a plea of guilty?

A. No sir. I only know what the commissioner told me, and the fish commissioner was also there when I was there.

Q. What is your authority for making this statement in this plea: "That the plea of guilty was forced from petitioner and was not a voluntary plea, so that he entered the plea under threat from the United States Attorney" and so on?

A. I didn't make that statement. I typed it.

Q. What are the facts on which it is based?

A. Based on the statement by the United States commissioner at Craig. He said he objected to the whole action.

Q. Did the United States Commissioner at Craig tell you that this plea was forced from Dalton?

A. He said these men were told that if they did not plead guilty their boats would be seized and taken to Juneau.

Q. Did he tell you that it was entered because of a threat by the United States Attorney?

A. Yes, in that language I gave.

Q. He told you the United States Attorney had threatened that if this plea was not entered, expensive and dilatory proceedings in admiralty would be started.

A. He said he had no voice in the matter.

Q. I am asking you about the threat of the United States Attorney that expensive and dilatory proceedings in admiralty would be started?

Mr. Paul. That has been answered twice.

Mr. Stabler. I don't think so.

The Court. She may answer.

A. He didn't say "expensive and dilatory proceedings in admiralty." Those words were not Mr. Bagley's words. What he said was the boats would be seized and taken to Juneau by the District Attorney's office.

Page 35-36, Transcript.

We submit that upon the testimony of Mrs. Paul—and it was not denied by any witness—the fear of arbitrary power in the hands of men who sometimes forget they represent the Law, extended beyond the accused Indian fishermen, and paralyzed even the justice court in Craig precinct before whom they were arraigned.

"Q. There was reference in your conversation with Mr. Bagley about the threat of the United States Attorney that expensive and dilatory proceedings in admiralty would be

started if said plea was not entered?

A. Just the language I used—that the District Attorney's office had said if they didn't plead guilty that expensive and dilatory proceedings in admiralty would be started.

* * * *

Q. Did you talk to Mr. Bagley about—what are your facts which you gathered over there, on which you base this statement, "That your petitioner offered to put up bond to secure the release of said boat during the determination of an admiralty suit, which right was refused"?

A. Mr. Paul said, "Why didn't you have the men put up bond?" and he said, "They wouldn't let them put up bond." I don't remember who wouldn't let them put up bond, but that was Mr. Bagley's answer, they wouldn't let them put up bond.

* * * *

Q. When you say, "Your petitioner offered to put up bond," what is your authority for saying that Maxfield Dalton offered to put up bond?

A. The words of the commissioner.

Q. What were those words?

A. I can't say just exactly word for word what he said at the time.

Q. Did the commissioner tell you Maxfield Dalton offered to put up bond?

A. He said the crews offered to put up

bond, there were three involved, all interested.

* * * *

Q. What is your authority for saying in this petition that Maxfield Dalton paid the fine under protest.

A. Because there is a full page—sheet of paper—but it is in the case in the files at Craig in the commissioner's office, where it specifically says, "This fine is paid under protest."

Pages 37 and 38, Transcript.

Mrs. Paul's testimony shows what care she and the defendant took to secure the true facts to be used in the petition for the writ of review in this case. They went directly to the Commissioner and justice of the peace at Craig, where the matter of the alleged trial took place, examined the papers and records, consulted with the owners of the boats threatened, and secured the facts from the commissioner when the records failed to show them. They did not rely on mere rumors or general reports, but took such due care as every responsible and honest attorney is expected to take in such a proceeding.

In addition we call the court's especial attention to the fact that the prosecution made no attempt to deny or qualify Mrs. Paul's testimony. No effort was made to bring Commissioner Bagley or the fish warden to testify, and both Mr. Stabler

and Judge Harding heard her testimony and neither offered himself as a witness to deny or explain anything she said, and the court ought to be bound by her uncontradicted testimony.

We think this evidence shows conclusively and beyond reasonable doubt, that Dalton and the other Indian fishermen were denied a fair trial, were not permitted to enter a plea of not guilty and have their guilt or innocence tested by the evidence in open court, were threatened with the loss of their boat, their season's work, with destitution for themselves and families the following winter season, and denied justice of any kind except on the terms dictated by the prosecuting officers.

3. THE PETITION FOR WRIT OF REVIEW.

The unfair acts of prosecuting officers in these and in other similar cases in the First Division, against Indian fishermen, naturally created much sympathy for the victims, and especially among their own people.

Page 85, Transcript.

House Joint Memorial No. 19, Session Laws of Alaska, 1929.

In his testimony in this cause, pages 25-29, Mr. Paul says that during the month of September he went to the town of Craig accompanied by Mrs. Paul, and thence over to Klawock, where, he had

been informed, Peratovich wished to see him about the Craig trial. He was employed by Peratovich for Dalton to take the case and attempt to recover the fine of $400 by Writ of Review.

> "And then he proceeded to tell me what actually had occured. He represented to me, in speaking for Dalton that the men were not guilty, but that he was informed that unless a voluntary plea of guilty were entered and an agreement to pay four hundred dollars fine and costs the District Attorney's office would seize the boat and take it to Juneau. The language of the petition, of course, is not the exact language in which Bob Peratovich made his statement. But it is the meaning that he intended to give me, and certainly the meaning that was understood by every person who talked about the case and who was around and in Craig and familiar with the case at the time it occured."
>
> Page 25-26, Transcript.

> "I went to the record and made a copy of it —of the papers that were on file, numbering my paragraphs according to the papers which were filed, and in the same order. Paper number five indicates a payment of $436 on September 1, 1928, by R. J. Peratovich, under protest. Then followed the judgment which is set forth in the petition."
>
> Page 27, Transcript.

After returning to his home in Ketchikan, Paul

wrote to Dalton explaining that Peratovich had employed him (Paul) to represent Dalton and the others interested in the effort to recover the fine paid "under protest." Paul prepared the necessary petition and bond and sent them over to Dalton that he might see the petition and sign the bond. Dalton sent Paul the money by mail to pay the costs of filing the papers (petition and bond) in the District Court, Page 28, Transcript. There was some trouble in the mail about the papers, but finally Paul received back the petition and the bond and—

> "Immediately then I joined the two together and sent them on to Judge Harding at Juneau with a letter stating that I thought it was a ministerial matter and would not require the exercise of discretion and that the Judge could have no hesitancy in signing the bond, and I wished it signed quickly so that the case could come up before Judge Hill. My reason was that Mr. Harding was at the time this trouble arose United States Attorney."
>
> Page 28, Transcript.

District Judge E. Coke Hill had been requested to hold a term of court at Ketchikan immediately after Judge Harding's appointment to try those cases in which Judge Harding was known to be disqualified for connection with them in his office as District Attorney. The Dalton case was one of them. In preparation for the hearing of the Dal-

tion case before Judge Hill, at Ketchikan, and on February 6, Mr. Paul wrote a letter to Judge Harding and enclosed the petition and bond with it, and probably a blank order approving the bond. The letter was written from Mr. Paul's office at Ketchikan to Judge Harding in Juneau, some 200 miles away, and it reads as follows:

Law Office of William L. Paul,
Ketchikan, Alaska, Feb. 6, 1929.

Hon. J. W. Harding, Judge,
Juneau, Alaska.

Dear Sir:

I am enclosing the petition, etc. in the matter of the application of Maxfield Dalton of Klawock, Alaska, for a writ of review. R. J. Peratovich, who signed as surety, is the principal merchant of Klawock, owns a cannery, light plant, water system and is worth many thousand dollars.

Inasmuch as signing the order allowing the writ is, in my opinion, not a judicial act, but merely ministerial, I am requesting that you sign same, in order that the matter may come up before Judge Hill next March.

Thanking you for your courtesy, I am,

Yours respectfully,
William L. Paul."

Page 54, Transcript.

Judge Harding received the letter and petition by mail at Juneau, Alaska, some 200 miles away

from Mr. Paul's office.

> "Whereupon the court ordered the said petition filed and directed that the matter as to whether or not the order asked would issue be set for hearing at the term of court called for Ketchikan to begin February 18, 1929, and directed that the United States Attorney and counsel for petitioner be so advised."
>
> Page 41, Transcript.

There is no notice of danger on the face of this order, no warning of any proceedings for "contempt," it merely orders the petition filed and directs that it "be set for hearing at the term of court called for Ketchikan to begin Feb. 18, 1929, etc.," although the Judge was advised that Mr. Paul intended to have the case tried before Judge Hill.

4. PREPARING THE CONTEMPT CASE.

Judge Harding at Juneau ordered the petition for the writ in the Dalton case filed on Feb. 13, 1929, page 40, Transcript; ten days thereafter, on Feb. 23, 1929, the case was called for hearing by Judge Harding at Ketchikan, 200 miles south of Juneau; on Feb. 13, Dalton was at Klawock or Craig, on the west coast of Prince of Wales Island, some 100 miles west of Ketchikan.

Page 20-21, Transcript.

In the meantime, without any notice or warning to Mr. Paul, Dalton's attorney, someone, pos-

sibly the District Attorney, though the record does not disclose who it was, procured one Neilson, the Deputy Marshal at Craig, in a letter which is referred to in Dalton's testimony but is not in the record, to command the Indian Dalton to go to Ketchikan, promising him fees, etc., and there he appeared on Feb. 23rd, ready for the proceedings which took place on that day before Judge Harding.

Pages 20-21, Transcript.

Here follows what the record contains about this strange proceeding, being the testimony of Dalton on cross examination by Mr. Paul:

Q. How did you happen to come to Ketchikan; somebody tell you to come?

A. Yes.

Q. Who? A. This court.

Q. Who in court, what is his name?

A. I don't know the name is.

Q. What kind of paper?

A. (Witness hands counsel paper) Is that the one? (Hands another paper to counsel).

Q. You got letter from marshal to come to Ketchikan?

A. Yes.

Q. Anybody tell you why you come?

A. No.

Q. When you find out first time why you

in Ketchikan?

A. I want to find out, come in to marshal, as what trouble. I can't never understand anything, I said, "Send wire." I ask Bagley send wire what trouble I got; never sent wire; never said nothing; I come over here.

Q. Did you know you did not have to come to Ketchikan?

A. No.

Q. You believed you had to come? A. No.

Q. When marshal told you to come, you think you have to come?

A. Because I got job there.

Q. Anybody read this letter to you?

A. Uh-huh.

Q. Did they tell you you will be paid witness fees and mileage in Ketchikan?

A. Yes.

Q. Signed by Nielson, deputy marshal?

A. Yes, Neilson.

.Q Did Neilson tell you who told him to write that letter?

A. No.

Pages 21-22 Transcript.

Whether this secret method of compelling Dalton's presence in court before Judge Harding on the trial which took place immediately on his appearance there, was done purposely to prevent Mr. Paul from becoming aware that he was to be tried

for contempt on a case to be made, without notice or an opportunity to secure the presence of Bagley, Peratovich and other witnesses for his defense, this court may judge, but that was its effect.

5. THE ALASKA STATUTE ON CONTEMPT.

Chapter 58, Secs. 1441 - 1455 of the Compiled Laws of Alaska, 1913 contains the statutory provisions for the punishment of both direct and constructive contempts and the rules for the trial of such cases. From the record at bar it appears that the judgment against the appellant is for direct contempt and is based on his supposed violation of the first and third sub-divisions of Sec. 1441, which read as follows:

> "Sec. 1441. The following acts or omissions, in respect to a court of justice or proceedings therein are deemed to be contempts of the authority of the court;
>
> First. Disorderly, contemptuous, or insolent behavior toward the judge while holding court, tending to impair its authority or to interrupt the due course of a trial or other judicial proceeding. . . ."
>
> Third: Misbehavior in office or wilful neglect or violation of duty by an attorney, clerk, marshal, or other person appointed or selected to perform a judicial or ministerial service."

The rule of practice in contempt cases is provided in Sec. 1443, as follows:

> "Sec. 1443. When a contempt is committed in the immediate view and presence of the court or officer, it may be punished summarily for which an order must be made reciting the facts as occurring in such immediate view and presence, determining that the person proceeded against is thereby guilty of contempt, and that he be punished as therein prescribed. In other cases of contempt the trial shall proceed upon testimony produced as in criminal cases, and the accused shall be entitled to be confronted with the witnesses against him, but such trial shall be by the court, or in the discretion of the court, upon application of the accused, a trial by jury may be had as in any criminal case."

Chapter 22, Session Laws of Alaska, 1925, is amendatory of the provisions of the last paragraph of Sec. 1443, and provides as follows:

> "Sec. 2. Upon the trial, in any of the courts of the Territory of Alaska, of any person or persons upon a charge of contempt not committed in the presence of the court or so near thereto as to obstruct the administration of justice, any of the persons so charged with contempt shall, upon application therefor, be entitled to trial by jury."

Under this provision and the facts in this case

Mr. Paul was entitled to a jury trial, which was denied to him because he was not advised that he was to be or was being tried on Feb. 23rd at Ketchikan.

We conclude from reading the statute and from the facts and circumstances in the record that it was determined, possibly by the United States Attorney, that the mere delivery of the petition, bond and letter by mail to the judge in his chambers in Juneau, would not constitute "disorderly, contemptuous, or insolent behavior toward the judge while holding court, tending to impair the authority or to interrupt the due course of a trial or other judicial proceeding," because it was not done in open court but in his Juneau chambers.

United States vs. Ginsberg 243 U. S. 472;
61 Law Ed. 853.

But if Mr. Paul should repeat the same words and acts "toward the judge while holding court" "in the immediate view and presence of the court," then the crime would be complete in the highest degree, and the judge would then have jurisdiction and power to punish him summarily for direct contempt without his having the right to "proceed upon testimony produced as in criminal cases,—and the accused shall be entitled to be confronted with the witnesses against him"—and without being "entitled to a trial by jury." Sec. 1443, Compiled Laws of Alaska, 1913. He would

then be in the hands of the judge, who would be unrestrained from doing complete justice in his case.

6. AN EXTRAORDINARY PRELIMINARY.

This trial began at 2:10 P. M., Feb. 23, 1929, at Ketchikan, before Judge Harding, page 2, Transcript, though Mr. Paul had fairly advised him in his letter of Feb. 6, that he desired it to "come up before Judge Hill next March." Page 54, Transcript.

The only pleading in the court when the case was called for trial was the petition for the writ of review, signed by Mr. Paul as attorney for Dalton, Mr. Paul's letter, and possibly an unsigned copy of an order allowing the writ.

See letter page 54, Transcript.

The trial was begun before any appearance, answer or other pleading had been filed in the case by the United States Attorney. No process of any kind had been served on Mr. Paul for contempt, no affidavit of merits charging any fact of contempt, nor any order to show cause as required by Sec. 1444, Compiled Laws of Alaska, 1913.

The intention to proceed with it as a contempt proceeding had been kept so secret that Mr. Paul had no notice of Dalton's expected appearance, or the reason therefor, though he was Dalton's attorney, and no suspicion was in his mind that any

one intended to take action against him for contempt of court. He had not intended any contempt of court, did not know that he was accused of having violated any law, had no warning of impending danger, and was entirely unsuspicious of what actually was in waiting for him.

Counsel feel a deep sense of regret to be compelled to call the attention of the appellate court to the facts in this remarkable case. Our respect for the court would keep us silent if nothing more were involved than the sum of the fines imposed. But the language used by the judge in his Order Reciting Contempt leaves upon the record and character of this young lawyer such a lasting and, we think, such an unjust blot of disgrace and shame, that we feel sure this court will not criticize us if we are both fair and frank in discussing the facts relating to it.

While the heading of the Bill of Exceptions, pages 1-2, Transcript, contains the usual prefatory statement necessary to advise the court about the matters involved, the real fact is that after the completion of an argument by other attorneys at 2:10 P. M. on that day, Mr. Stabler, Mr. Paul and other members of the bar being seated quietly in the court room, Judge Harding said to Mr. Paul:

> "The Court: The application for the writ —for an order allowing a writ of review is before the court for hearing."

Page 2, Transcript.

The court will notice that Judge Harding announces to Mr. Paul that it is the Dalton case that is to be heard. See also Page 1, Transcript, and page 40 Transcript for the same statements.

"Mr. Paul: I wish again to ask leave of the court to continue the case in order that I may make an amended petition—some of the language might be changed.

The Court: Of course, this proceeding is now filed on certain allegations.

Mr. Paul. I wish the privilege of amending, which I think is within the discretion of the court.

The Court: You can state the nature of the amendment.

Mr. Paul: Well, I want to change the language I think of section four (3) of the petition, as not being necessary to substantiate it reasons for—grounds for the—errors in the proceedings and judgment complained of I might strike out portions under number three of line two, all of three and four and a portion of line five under number three.

The Court: You propose to—

Mr. Paul: That is what I want to do."

Page 2-3, Transcript.

If this court will now look at paragraph three (3) of the Petition for a Writ of Review, page 53

Transcript, it will find that this request was to strike out the entire clause which the court afterward used as his basis for contempt. No answer was made to this respectful request and Judge Harding proceeded:

> "The Court: Of course this petition is filed without the support of any affidavits.
>
> Mr. Paul: Will the court rule on my request for a continuance?
>
> The Court: I would like a statement from counsel upon what basis you file this petition making these allegations without the support of any affidavits or evidence; and the court has set this hearing for now. It is open for you to introduce evidence of these matters."
>
> Page 3, Transcript.

No affidavit charging contempt had been served on Mr. Paul, no order to show cause given, no warning, no notice—out of a clear sky came this demand—"and the court has set this hearing for now. It is open for you to introduce evidence of these matters." And Mr. Paul's witnesses, Bagley, Peratovich and the justice's record were all over in Craig, 100 miles away.

> "Mr. Paul: I thought I was following the requirements of the law in asking for a writ of review of the proceedings in the commissioner's court, and I followed or tried to follow section 1376 of the Compiled Laws of Alaska and it was my opinion—judgment—

> that I had set forth in the form and manner required by that section the various items in the petition that are called for, which will give me the order I am seeking. Section 1376 says: "The writ shall be allowed by the District Court or judge thereof, upon the petition of the plaintiff, describing the decision or determination sought to be reviewed with convenient certainty, and setting forth the errors alleged to have been committed therein. Such petition shall be signed by the plaintiff or his attorney, and verified by the certificate of an attorney of the court, to the effect that he had examined the process or proceeding and the decision or determination therein and that the same is erroneous, as alleged in the petition." My view was a supporting affidavit was not required, but if it is the ruling of the court, if it is required, then I think I still have the privilege of filing a supporting affidavit."

The judge does not seem to have been interested in the law of review, for he harked back to the clause which he afterwards thought to constitute contempt.

> "The Court: You allege certain new matter in this petition which is under your oath here as an attorney which I have reason to know is not correct."
>
> Page 4, Transcript.

Here is not only an admission of his personal

bias and prejudice against Mr. Paul, but of his disqualification to sit in judgment in the Dalton case under the provisions of Sec. 1539, Compiled Laws of Alaska, 1913, which provides:

> Section 1539. A judicial officer is a person authorized to act as a judge in a court of justice. Such officer shall not act as such in a court of which he is a member in any of the following cases:
>
> First. In any action or proceeding to which he is a party or in which he is directly interested. * * *
>
> Fourth: When he has been attorney in the action or proceeding in question for either party.
>
> "Mr. Paul: Of course I wish to state that these are not statements of fact, but my opinion concerning errors which were made, on the strength of which I am asking the record come up from the commissioner's court.
>
> The Court: The complaint is sworn to by you as an attorney."
>
> Page 4, Transcript.

The judge was wrong in both matters—it was a petition and not a complaint, it was not sworn to but only certified to by Mr. Paul "that I have examined the proceeding and judgment complained of above and believe that the same is erroneous as alleged in the petition"—a mere conclusion of law.

Pages 51-54, Transcript.

"The Court: Do you think you have a right to file a petition stating these facts without any basis for so stating?

Mr. Paul: I thought I had.

The Court: Without any basis for so stating?

Mr. Paul: Oh, no, not that. If the court requires a supporting affidavit I will submit it.

The Court: I would like to know from you as an attorney what the facts are upon which you base the filing of the petition?

Mr. Paul: It was the statement made by the real party in interest which is the application of Maxfield Dalton for a writ of review."

Page 5, Transcript.

The Court's attention is now called to Mr. Paul's testimony, pages 26-29, Transcript, where he details the facts about his visit to Craig and Klawock, his personal examination of the records of the justice court at Craig, his conversation with Peratovich the owner of the boat at Klawock, his employment by Peratovich as attorney for Dalton and others interested in the money paid for the $400 fine, his preparation of the petition which he sent to Dalton by mail who approved and returned it to Mr. Paul with the necessary money to pay for entering the case in the District Court, etc.

"The Court: Maxfield Dalton is now here.

Mr. Paul: I know he is."

Page 5, Transcript.

But who got him "here"? and how? and what for? Why was Mr. Paul not given notice that he, too, might have Bagley, Peratovich and the record "here"?

"The Court: And you base this upon statements made to you by Maxfield Dalton?

Mr. Paul: Yes."

What did Judge Harding mean by that expressive word "this"? There is yet no process charging Mr. Paul with the crime of "this"or any other.

"The Court: These allegations of the petition, you state to the court, are made to you upon the basis of statements made to you by Maxfield Dalton."

He is now getting more specific in the accusations of the crime of contempt for Mr. Paul is now in the "immediate view and presence of the court."

"Mr. Paul: The facts, were, your honor, given me by Maxfield Dalton in part, and others.

The Court: Are you willing to call him on the stand on that?"

Page 6, Transcript.

Mr. Paul: Of course, I don't think we need

to go as far as that. I am submitting the petition in accordance with section 1376.

The Court: I have reason to know these statements are untrue. Are you willing to call him on the stand?"

Page 6, Transcript.

Here was a young lawyer with limited experience, standing before the court, thinking he was submitting the petition of Maxfield Dalton in a civil case, being brow-beaten by an angry and biased judge, and in sheer desperation very reluctantly he consented that Dalton be called in a proceeding which he felt to be decidedly irregular—but in "the Dalton" case.

"Mr. Paul: I am willing to call him on the stand and willing to take the oath on the stand, too.

The Court: Very well. Then you will have the right to call Maxfield Dalton.

Mr. Paul: I think that proceeding, however, is not regular.

The Court: Do you object to it, or care to put him on the stand?

Mr. Paul: No, I am asking the court to use discretion in this matter. I have asked in the first place that I be permitted to amend, which I believe is my privilege, and certainly has been allowed in other instances than this by the District Court of Alaska, and I think the

law will hold in many cases there is a right to amend petitions exactly as complaints.

The Court: But I am asking you as an attorney of this bar upon what you base this petition?

Mr. Paul: I have stated.

The Court: The petitioner himself, Maxfield Dalton, is now here, and if you care to call him to show he ever gave you any information to the effect contained in that petition, I am ready to hear him."

Page 6, Transcript.

Even a young, inexperienced and frightened lawyer could know that it would do no good to present evidence on that matter to a judge who had just denounced the petition as "untrue,"—as based on perjury in his estimation.

"Mr. Paul: Of course my statement is entirely information that came to me upon a visit I made to Klawock; if my memory serves me right I talked to Maxfield Dalton, Bob Peratovich, W. J. Chuck and others.

The Court: Are you ready to put him on the stand to show he gave you information contained in any of these allegations?

Mr. Paul: Am I required to? I think that is on the court's responsibility, not mine.

The Court: You are not willing to put him on?

Mr. Paul: I am willing he should take the stand and be examined.

The Court: You are willing that he take the stand and be examined by the United States Attorney?

Mr. Paul: I am willing that he be examined, but I think the court might set another time — as long as the proceeding is taking this direction—for me to prepare myself."

Page 6-7, Transcript.

This additional appeal for a continuance "as long as the proceeding is taking this direction—for me to prepare myself" was treated as all others of this kind were—by intentional disregard, denial and continued baiting.

"The Court: He is here and can testify as well now as any other time.

Mr. Paul: Yes, but there are other people interested.

The Court: Do you object to putting him on?

Mr. Paul: No, I am not objecting.

The Court: If you don't object, we might as well put him on."

"(At this point Maxfield Dalton was sworn by the clerk.)"

Page 7, Transcript.

And thus, in an American court ,this young law-

yer, over his request to amend, to have a continuance to secure witnesses, and time for preparation —was compelled by the judge himself to be brought "in the immediate view and presence of the court" so that court might acquire jurisdiction to convict him of the crime of contempt.

And no charge of contempt had been preferred against him by affidavit or otherwise, no order to show cause had been served on him, no witness had been sworn, and the judge was engaged in hearing the case of "In the matter of the application of Maxfield Dalton for a writ of review."

See Judge Harding's statement of this fact
Page 40, Transcript.

7. THE TRIAL—THE WITNESS—THE EVIDENCE.

The preliminary baiting of Mr. Paul by the judge having been effective, and concluded, this extraordinary trial began.

The prefatory statement made by Judge Harding in his "Order Reciting Contempt" against Mr. Paul, at Page 40, Transcript, shows just what he announced to be before the court for hearing at that time:

> "On February 23, 1929, this matter came on for hearing before the court in open court and in the immediate view and presence of the court, upon petition of one Maxfield Dal-

> ton for a Writ of Review," and had theretofore, to-wit, on February 13, 1929, been filed by William L. Paul, an attorney at law and a member of the Bar of this court, in the above entitled court, for the said Maxfield Dalton, a full, true and correct copy of which said petion is hereto attached, marked Exhibit 1, and made a part hereof."

The court's attention is further called to the state of the pleadings at the time of the trial. There was nothing in the way of pleadings before the court at that time except the Petition for the Writ of Review. No appearance, demurrer, answer, motion or other pleading had been filed, or were ever filed, by the United States District Attorney, or anyone, on the part of the opponents of this petition. No issue was attempted to be framed by pleading, except the petition for the Writ of Review. As a matter of fact and law there was nothing before Judge Harding for trial, other than the petition, except the case that was being created by his preliminary attack on Mr. Paul for contempt of Court. And there was no pleading, affidavit, process, order to show cause, no notice or warning, in any contempt case before him.

Then another queer thing happened. Instead of allowing Mr. Paul to introduce evidence in support of the allegations in the Dalton petition, if he desired to do so, Mr. Stabler, the United States District attorney, took control of the proceedings,

called Dalton, Mr. Paul's client, as his witness and launched at once into the prosecution of Paul for Contempt of Court.

Page 9, Transcript.

Of the five errors assigned in the Dalton petition, page 53, Transcript, four were not mentioned on the alleged trial. The United States District Attorney confined his examination of Dalton entirely to the supposed contempt in the third assigned error; the whole evidence in the case was confined to the allegations in that paragraph.

The Writ of Review is provided for by Chapter 55, Secs. 1374-1383, Compiled Laws of Alaska, 1913. Section 1376 provides:

> Section 1376. The writ shall be allowed by the district court or judge thereof, upon the petition of the plaintiff describing the decision or determination sought to be reviewed with convenient certainty, and setting forth the errors alleged to have been committed therein. Such petition shall be signed by the plaintiff or his attorney, and verified by the certificate of an attorney of the court, to the effect that he had examined the process or proceeding and the decision or determination therein, and that the same is erroneous, as alleged in the petition.
>
> Sec. 1377. The writ shall be allowed in all cases where there is no appeal or other plain, speedy and adequate remedy, and where the

inferior court, officer, or tribunal in the exercise of judicial functions appears to have exercised such functions erroneously, or to have exceeded it or his jurisdiction to the injury of some substantial right of the plaintiff.

Sec. 1378. Before allowing the writ the court or judge shall require the party applying therefor to give an undertaking, with one or more sureties, subject to its or his approval, in the amount to be fixed by it or him, conditioned that he will perform the judgment or decision sought to be reviewed in case the district court shall so order, and judgment may be given in said court against the applicant and his surety or sureties in case the judgment or decision sought to be reviewed shall be affirmed for the amount thereof, and the cost of said proceeding.

Sec. 1381. Upon filing of the order allowing the writ, and the petition and undertaking of the plaintiff, the clerk shall issue the writ, according to the direction of the order. The writ shall be served, etc.

Sec. 1383. Upon the review the court shall have the power to affirm, modify, reverse, or annul the decision or determination reviewed, and, if necessary, to award restitution to the plaintiff, or by mandate, direct the inferior court, officer, or tribunal to proceed in the matter reviewed according to its decision, etc.

THE WITNESSES.

The court will see from the record that but

three witnesses testified before Judge Harding—Dalton, Mr. Paul and Mrs. William L. Paul. Dalton, pages 9-25, repeated at 55-70; Mr. Paul 25-30, repeated at 79-84; Mrs. Paul, 30-39, repeated at pages 70-79, Transcript.

Neither Judge Harding nor Mr. Stabler was sworn as a witness and no witness was offered in support of the alleged contempt by them except Dalton. The court will see from his inability to understand and correctly answer the questions propounded to him on Mr. Stabler's part, that Dalton was an illiterate Indian, totally unacquainted with what it all meant, and hardly able to understand the meaning of the simplest questions asked.

THE EVIDENCE.

The evident purpose of all the secrecy in securing the presence of Dalton at the time of the trial was to lead him into testifying that he had not talked to Mr. Paul, his attorney, about certain matters, and thereby to prove that Mr. Paul, himself, was responsible for the clause carrying the alleged contempt in the Petition for Review.

> "Mr. Paul: If the court please, the attorney is doing a good deal of leading. He testified he got a letter and he turns it into a complaint.
>
> The Court: They were leading questions.
>
> Q. When you were told you were guilty

did anybody tell you you had to say that?

A. Baronovich, he speak, you know, but he afraid to lose boat. Bob Peratovich told me to say that. "If you don't say it, I lose the boat."

Page 12, Transcript.

(The record shows that "Baronovich" is a reporter's mistake, and that when that name is used it means "Peratovich").

Q. Baronovich told you to plead guilty.

A. Yes.

Q. Did anybody else tell you to plead guilty? A. No.

Q. Did the United States Attorney tell you to plead guilty? A. No.

Q. Did any officer tell you to plead guilty?

A. No.

Q. Just Bob Peratovich? A. Yes.

Q. Now at that time did you offer to put up a bond? A. No.

Q. To secure the release of Peratovich's boat? A. No.

Q. Did anybody say anything to you about a bond? A. No.

Q. Did anybody say anything to you about a suit in admiralty? A. No.

Q. Did anybody refuse to let you put up a bond? A. No.

Pages 12-13, Transcript.

This is evidently the testimony upon which the Court in his Order Reciting Contempt based his conclusion that Mr. Paul's statements in the 3rd paragraph of the Petition "were fictitious, false and untrue and known by the said William L. Paul to be fictitious, false and untrue, and were made by the said William L. Paul with the fraudulent intent and purpose of deceiving the court," etc. Page 45, Transcript.

On cross examination by Mr. Paul, however, Dalton disclosed some facts which the skillful and leading questions of the District Attorney did not bring out.

Cross examination (By Mr. Paul)

"Q. Maxfield, you worked for Bob Peratovich. A. Yes.

Q. On his boat? A. Yes.

Q. Are you related to Bob Peratovich?
A. Yes.

Q. Does Bob Peratovich do your business for you? A. Yes."

Page 16, Transcript.

Q. Awhile ago, talking to Mr. Stabler, you said Bob afraid of his boat?

A. I say he afraid he lost his boat. That is the way he feel to pay his fine.

Q. Do you know why he was afraid?
A. No.

Q. Do you know who made him afraid to lose his boat? A. No.

Q. Do you know if the fish commissioner tell him "going grab your boat"? A. No.

Q. You never heard? A. No.

Q. Did you hear Bob talk to fish commissioner?

A. No. I hear talk to fish commissioner, but I don't know what talking about.

Page 18, Transcript.

Q. After Bob Peratovich came from Seattle you testified you got a letter from him (me?) Do you have that letter?

A. No, he got him.

Q. Bob Peratovich? A. Yes.

Q. He keep all your letters this case?

A. Yes.

Q. Does he have that letter too? A. Yes.

Q. One I wrote you after Bob came from Seattle? A. Yes.

Q. In that letter do you remember what that letter said? A. No.

Q. Did I promise to win case for you?

A. Uh-huh.

Q. Did I tell you good case, bad case, or not sure?

A. I don't know.

Page 19, Transcript.

Q. Do you remember how many papers in that letter when you got bond?
A. Two.

Q. Two? A. Uh-huh.

Q. What was on each paper? A. I can't understand.

Q. Did you read the papers?
A. They read to me.

Q. They read to you; everything was all right, you think?
A. Uh-huh.

Q. What did you do with the papers?
A. I don't know. Bob sent them back, I think, to you.

Q. Bob looked after your business?
A. Uh-huh.

Page 20, Transcript.

Q. Did you feel all right at the time you paid the money?
A. No.

Q. Do you know what protest means?
A. No.

Q. Now you talked to the fish commissioner Hardy?
A. I not talk to him.

Q. Never talked to him? A. No.

Q. Bob do all the talking? A. Yes.

Q. Talked for you, too? A. Yes.

Q. Do you know this petition filed in this case, do you know about it? A. Yes.

Q. Who read it to you? A. Bob Peratovich.

Q. You feel it was all right. A. Uh-huh.

Q. Do you want your case to come up?
A. Uh-huh.

Q. You gave the letter back to Bob Peratovich to send to me, did you? A. Uh-huh.

Page 23, Transcript.

Examination by Mr. Stabler.

Q. Was Peratovich in Mr. Bagley's office when you told the Commissioner you were guilty? A. Yes.

Q. Peratovich was in Mr. Bagley's office when you told the Commissioner you were guilty?

A. Uh-huh. Peratovich told me to say that. He didn't want to lose his boat.

Q. He told you to say it? A. Uh-huh.

Q. Did Peratovich say anything to the Commissioner Mr. Bagley?

A. He talked—as soon as I pay my fine I go out; he talk, I don't know what he talk about.

Q. You pleaded guilty because Peratovich told you to, is that right?

A. Yes. Mr. Bagley he got this case, he knows everything."

Page 24, Transcript.

On this phase of the case the Pauls, as witnesses, fully support and reinforce the poorly expressed Indian evidence of Dalton. Mr. Paul testified:

> (25) "I then proceeded to the town of Klawock and while there was informed that Bob Peratovich wished to see me about his boat. Bob Peratovich, when I went to see him, told me that Maxfield Dalton was out of town but had asked him to represent him, and see if something could not be done about recovering the four hundred dollars. And then he proceeded to tell me what actually had occurred. He represented to me, in speaking for Dalton (26) that the men were not guilty, but that he was informed that unless a voluntary plea of guilty were entered, and an agreement to pay four hundred dollars fine and costs, the District Attorney's office would seize the boat and take it to Juneau. * * * The matter of putting up the bond—that statement in the petition, comes through Bob Peratovich, who claimed to be representing Maxfield Dalton, and it was my understanding at the time that Bob Peratovich acted as a sort of an attorney in the case being also an interested party—but he was refused: he was told—so he informed me—that he could not put up a bond."

Page 25-26, Transcript.

Mr. Paul further testified that he wrote to Dal-

ton after his return to Ketchikan, and told him that Peratovich had employed him to represent Dalton, and asked for confirmation of Bob's action which was fully given.

> "I received a letter asking me to proceed and paying me ten dollars for costs."
>
> Page 27, Transcript.

Then Mr. Paul prepared the petition and bond, at Ketchikan and sent them to Dalton by mail. He received them back from Dalton after some delay, and Dalton testified before Judge Harding that Peratovich read them to him in Klawock, before their return to Mr. Paul.

> "Q. Do you know this petition filed in this case, do you know about it? A. Yes.
>
> Q. Who read it to you? A. Bob Baronovich (Peratovich).
>
> Q. Do you feel it was all right? A. Uh-huh."

Mrs. William L. Paul testified on this matter:

> Q. Now then, did you hear about this particular case—hear it discussed by Bob Peratovich and Maxfield Dalton?
>
> A. Yes. I heard it discussed by Bob Peratovich.
>
> Q. Was he presuming to represent anybody? A. Yes.
>
> Q. Whom did he represent?

A. The master of the boat.

Q. What was his name?
A. Maxfield Dalton.

Q. Did he say anything to you about his relationship to the boat itself?
A. He said he was the owner of the boat; it was his boat.

Q. Do you remember the story he told about the boat?
A. Yes.

Q. Are you familiar with the contents of the petition? A. Yes.

Q. Where was Maxfield Dalton at that time?

Page 31, Transcript.

A. He was out fishing.

Page 32, Transcript.

Q. What became of the petition?
A. It was filed in court.

Q. Was that ever submitted to Maxfield Dalton?
A. The bond and the petition were sent together in the first instance; he had sent the petition back without the bond.

Q. In the first instance the petition and bond were sent in one letter to Maxfield Dalton? A. Yes.

Q. And the petition was returned?
A. Without the bond.

Q. Without the bond?
A. But with the ten dollars."
Page 34, Transcript.

Both Mr. and Mrs. Paul testified fully and clearly that Mr. Paul was employed at Klawock by Peratovich, the owner of the boat, to represent Dalton and Peratovich both, and that Dalton was so informed by letter, and by return mail fully authorized him to act as attorney for him; that the petition and bond were both sent to Dalton, read to him by Peratovich, and he approved them and sent the fees for filing them to Mr. Paul; the Pauls both made careful inquiry about the facts at Craig, from the Commissioner (page 35, Transcript), and there inspected Judge Bagley's records in the case, took such notes and copies as they needed, and generally acted in entire good faith in securing the facts in the way any other careful and honorable laywer would do. And there is no attempt on the part of the prosecution by the testimony of a witness to deny the good faith of Mr. Paul in these matters, or of his fair employment as the attorney for Dalton, or that Dalton received the petition and bond in the case, heard them read by Peratovich, and returned them with his approval and the fee of ten dollars with which to file them in the District Court.

Nor was there any attempt by the prosecution to impeach the character of either of these three wit-

nesses, or to deny their testimony.

8. FINDINGS OF FACT IN ORDER RECITING CONTEMPT

The trial of the appellant took place on February 23, 1929, and was wholly concluded on that day.

Pages 1 and 40, Transcript

The Affidavit of Prejudice, complained of in the Order Reciting Contempt, was made, sworn to and filed by Maxfield Dalton in his case entitled "In the Matter of the Application of Maxfield Dalton for a Writ of Review" on February 25, 1929, two days after the trial of Mr. Paul for contempt on February 23rd.

Pages 84-88, Transcript.

The trial in this case, after the preliminary coercion by Judge Harding, began by Mr. Stabler's calling Maxfield Dalton, as a witness for the prosecution. In support of his own good faith and honest purpose, in the Dalton case and at the earnest insistence of Judge Harding (page 25, Transcript), Mr. Paul was sworn and thereafter called Mrs. Paul as a witness to the same purpose. Judge Harding, having thus coerced the trial of this case upon the evidence of witnesses, and Mr. Stabler in so trying it, gave a fixed legal character to the case which this court will not fail to recognize. By this action on the part of the court and the

district attorney, they stamped it a constructive contempt, where "the trial shall proceed upon testimony produced as in criminal cases." Sec. 1443 C. L. A. 1913. Judge Harding established this character of the offense in his Order Reciting Contempt, when, after declaring Paul's testimony to be "fictitious, false and untrue" he says "all whereof more fully appears by the transcript of said evidence, and said statement on his own behalf, and the record and files of said proceedings hereunto annexed".

Page 49, Transcript.

He thus based his final judgment on the "transcript of said evidence" and the record and files in the case. The Statute of Alaska provides, where contempt is tried on the evidence of witnesses as in criminal cases.

> Sec. 1450. Upon the evidence so taken the court or judicial officer shall determine whether or not the defendant is guilty of the contempt charged and, if it be determined that he is so guilty, shall sentence him to be punished as provided in this chapter."

The case having been forced to trial by Judge Harding on the evidence of witnesses, because the alleged contempt did not take place "toward the judge while holding court" (sec. 1441, comp. Laws Alaska, 1913, the above quoted section applies, and the case must be tried "upon the evidence so

taken", and not upon the mere fiat of the judge as for direct contempt, "toward the judge while holding court" and "in the immediate view and presence of the court".

At any rate it would be a shocking thing for an American judge to render a decision of conviction for crime upon any other than evidence fairly and lawfully presented him. To that phase of the case we now direct attention.

We call the attention of the appellate court to the alleged findings of fact made by Judge Harding in his Order Reciting Contempt and to "the evidence so taken by the court or judicial officer" upon which he "shall determine whether or not the defendant is guilty of the contempt charged" (sec. 1450, supra). We make the point that there is no evidence in the record to support these findings—nor the two final judgments.

The Order Reciting Contempt contains two separate findings and judgments against the appellant Paul. The first finding and judgment is based upon the alleged filing of the petition for review, containing paragraph 3, before Judge Harding on February 13, 1929, upon which a fine of $75.00 is imposed.

Page 40-47, Transcript.

The second finding and judgment is based upon the same paragraph 3 in the petition for review, with the additional charge of contempt for

filing the affidavit of prejudice in the Dalton case. (pages 84-87, Transcript).

Pages 47-51, Transcript,

The trial for contempt took place on February 23, 1929, Page 1. Tr.

The affifdavit of prejudice in the Dalton case appears to have been signed and sworn to by Dalton on February 25, 1929, and was attached to Judge Harding's Order Reciting Contempt, but there is no testimony of any witness or other evidence about it in the record. There are no file marks to show when it came into court.

The Order Reciting Contempt is dated March 4, 1929, and was made, signed and filed on that day as shown by the file marks in the record.

Page 51, Transcript.

9. FINDINGS IN SUPPORT OF FIRST JUDGMENT

The findings of fact and the judgment in the first ground of contempt are based wholly upon the alleged contempt contained in the words of the 3rd paragraph of the Petition for the Writ of Review.

Page 53, Transcript.

These findings and the judgment thereon are to be found on page 40-47 Transcript. To show how even a judge may sometimes use a wrong

statement of fact, when that very matter is before the court, on page 40 Transcript, in his Order Reciting Contempt, Judge Harding solemnly finds as a fact that the Petition for the Writ of Review

> "had theretofore, towit, on February 13, 1929, been filed by William L. Paul, an attorney at law and member of bar of this court" etc,

And on the very next page, 41, he makes this finding:

> "Whereupon the court ordered the said petition filed" etc.

On February 13, 1929, Judge Harding was in Juneau chambers, and William L. Paul was in Ketchikan, 200 miles away. The fact was that Judge Harding on that day received in Juneau the letter written by Mr. Paul on February 6 at Ketchikan, with the petition, Page 54, Transcript, and himself ordered the petition to be filed, and Mr. Paul did not file it, or intend Judge Harding to file it. This is not an important error, but it shows that even a judge may sometimes make a verbal slip, as Mr. Paul is alleged to have done in paragraph 3 of the petition.

On page 44, Transcript, begins the recital of a long list of reproachful adjectives describing Mr. Paul's duty to the court, and on page 45 quotes the alleged contemptuous words found in paragraph 3 of the Petition for the Writ:

"and certified the same to the effect that he had examined the proceedings and judgment in the case complained of and believed that the same was erroneous as alleged in the petition.

Whereas in truth and in fact the said statements and allegations of said petition so made, signed, certified and filed in said court as aforesaid, by the said William L. Paul, acting in the office and capacity of an attorney at law and member of the bar of this court as aforesaid, in the proceedings aforesaid, and in the immediate view and presence of the court aforesaid, were fictitious, false and untrue and were known by the said William L. Paul to be fictitious, false and untrue, and were made by the said William L. Paul with the fraudulent intent and purpose of deceiving the court and thereby obtaining of and from the court a process known as a writ of review; that said statements and allegations of said petition so made, signed, certified and filed, as aforesaid, were false and untrue in this: That while said petitioner Maxfield Dalton did enter a plea of guilty to the charge of illegal fishing before said United States Commissioner, H. S. Bagley, and was sentenced by said commissioner to pay a fine of four hundred dollars and costs taxed at thirty-six dollars.

1. Said plea of guilty was not forced from said petitioner."

Page 46, Transcript.

Of course, Judge Harding was not present at the trial of Dalton at Craig, and does not know what occurred there except from the evidence of the witnesses before him, and cannot take judicial notice of the fact assumed; it must be upon the testimony of Dalton, Mr. Paul and Mrs. Paul, for they were the only witnesses examined about it. While much of the evidence was hearsay, it was not objected to, and proves beyond a reasonable doubt that the plea of guilty was forced from said petitioner to save the boat from being taken to Juneau for forfeiture.

2. "and said plea was a voluntary plea on the part of said petitioner."

Page 46, Transcript.

We submit to the appellate court that Judge Harding had no evidence before him to support that finding. The evidence was all the other way and was not denied nor questioned by any witnes or other evidence in the case.

3. "and said petitioner did not enter said plea of guilty under a threat of the United States Attorney that expensive and dilatory proceedings in admiralty would be started if the said plea was not entered."

Page 46, Transcript.

No evidence was introduced on the trial to show

who was the United States Attorney at the time of the trial of Dalton at Craig. We have stated heretofore in this brief that Judge Harding then occupied that office, and it may be the court will take judicial notice of that fact, though it is not shown by any evidence in the case. The court may also take judicial notice of the fact that the United States District Attorneys in Alaska have assistants who are appointed with the consent of the Attorney General, and are fully authorized to represent them in all such matters as this Craig trial.

We submit that in the case at bar, somebody did represent the District Attorney, and act in his name, when, after waiting from August 27, the day of arrest until Sunday, Sept. 2, the day of trial, the penalty was imposed. The earmarks of this assumption are these: as a matter of law the officers of the Bureau of Fisheries may make arrests for violations of the Fisheries laws. But when they have done so, the burden of the prosecution falls on the District Attorney's office and no compromise or other matters can be agreed upon except by and with the consent of the District Attorney. If the negotiations were carried on by the Fish Wardens with Commissioner Bagley, and Peratovich, representing Dalton, they undoubtedly represented that it was at the direction of the District Attorney or the District Attorney's office, as the testimony of both Mr. and Mrs. Paul asserts.

Every subsequent act in this case indicates that the District Attorney was carrying out the plan outlined by the witnesses; for the men were not released from arrest until they had agreed to pay the fine of $400 and had done so (in the case of Dalton) under protest. And then the District Attorney without further communication with him by the defendant Dalton, ordered the boat released although the law directs what shall be done with fishing gear used in violation of law. This practice of bargaining for a plea of guilty (very effective in southeastern Alaska where the fishing season lasts only a few days and the mere thought of having a fishing boat held for legal proceedings would make the person owning it realize that his entire year was ruined whether he was innocent or guilty) was so much abused that the legislature of Alaska passed a memorial unanimously asking Congress to change the law. (House Joint Memorial No. 19, Session Laws of Alaska 1929). And does it make any legal difference, if the bargaining was done by the District Attorney's deputy or other representative? In any case the parties two hundred miles distant from the office of the District Attorney at Juneau, in Craig, would understand that whatever was being done in the prosecution of this crime was being done by the District Attorney. If these representations were being made at Craig and were so understood by Perato-

vich, the attorney for Dalton, Dalton would be justified in saying in the petition prepared for him by Mr. Paul that "the plea of guilty was forced by a threat of the United States Attorney." If this is true, and the testimony abundantly supports it, how can Judge Harding take exception to it and say that of his own personal knowledge such a statement is untrue. He must perforce depend upon the testimony of others as to what occurred at Craig. And when he depends upon the testimony of others, it is not direct contempt.

The evidence shows beyond a reasonable doubt that Commissioner Bagley, the justice before whom Dalton was tried, told Mrs. Paul how the pressure was exerted. On cross examination by Mr. Stabler she testified:

> "Q. Were you present in court at the time Maxfield Dalton entered a plea of guilty?
>
> A. No sir. I only know what the commissioner told, and the fish commissioner was also there when I was there.
>
> Q. What is your authority for making this statement in this plea: "That the plea of guilty was forced from petitioner and was not a voluntary plea, so that he entered the plea under threat of the United States Attorney," and so on?
>
> A. I didn't make that statement. I typed it.

Q. What are the facts on which it is based?

A. Based on the statement by the United States Commissioner at Craig. He said he objected to the whole action.

Q. Did the United States Commissioner at Craig tell you that this plea was forced from Maxfield Dalton?

A. He said those men were told that if they did not plead guilty their boats would be seized and taken to Juneau.

Q. Did he tell you it was entered because of a threat by the United States Attorney?

A. Yes, in that language I gave. (36).

Q. He told you the United States Attorney had threatened that if this plea was not entered, expensive and dilatory proceedings in admiralty would be started?

A. He said he had no voice in the matter.

Page 35-36, Transcript.

A. Just the language I used—that the District Attorney's office said if they didn't plead guilty that expensive and dilatory proceedings in admiralty would be started."

Page 37, Transcript.

The evidence in this case is without dispute that the officials in charge of this proceeding at Craig did make that threat in the name and as representative of the United States District Attorney and all parties there understood it that way. Some official representing the District Attorney did make that

threat, with the result mentioned. Judge Harding was not there, and while he may have knowledge in his own breast that he did not make such a threat, the very law itself and the circumstances in the case made the threat, and his representative at Craig repeated and enforced it. And if the court had given Mr. Paul notice of the proposed contempt proceedings he could have had ample proof of the threat at the trial.

> 4. "That said petitioner did not offer to put up a bond to secure the release of said boat during the determination of an admiralty suit or at all."
>
> Page 46, Transcript.

Of course the evidence on that point is clear, convincing and undisputed in the record. The evidence is all one way and Judge Harding is mistaken in making such a finding—there is no evidence in the record to support it.

> 5. "that said petitioner was not refused the right to put up such a bond."
>
> Page 46, Transcript.

Mrs. Paul testified that Commissioner Bagley told her that such right was refused (page 38, Transcript). Mr. Paul testified that Peratovich gave him the same statement (page 26, Transcript) and not a witness denied it. There is no evidence in the record to justify that finding.

6. "that said petitioner did not pay his said fine under protest."

Page 46, Transcript.

Mr. Stabler asked Mrs. Paul about that and she said:

"A. Because there is a full page—sheet of paper—but it is in the case in the files at Craig in the Commissioner's office where it specifically says: "This fine is paid under protest"

Page 39, Transcript.

and Mr. Paul testified:

"Paper number five indicates a payment of $436 on September 1st, 1928 by R. J. Peratovich under protest."

Page 27 Transcript.

7. "that said petitioner did not inform said commissioner at the time of paying the fine or at any other time or at all that he protested against the entire proceedings and would ask for a review by the District Court, or at all."

Page 46, Transcript.

Again, Judge Harding was not present at the Craig trial and cannot have any personal knowledge of that fact—the testimony is the other way. Dalton was represented at that trial by his partner Peratovich, an educated man, who advised with him, made formal objections and offers for him, and saw to it that the protest against the payment

of the fine was made for him. Concede that these things were actually done for Dalton by Peratovich—and the testimony is clear and undisputed that they were so done—in the law they were done by Dalton.

Because these matters were done by Peratovich, as the attorney for Dalton, Judge Harding makes the finding that they were not done by Dalton. That is a wrong assumption and there is no evidence in the record upon which to base it.

In his conclusion, on page 47, Transcript, Judge Harding said:

> 8. "that William L. Paul, when asked as an attorney as to the source of the allegations made in his petition, stated that they were made to him by the real party in interest, Maxfield Dalton, whereas in fact they were not so made to him, and his statement to the court in his own behalf herein shows they were not in fact made to him by Maxfield Dalton."
>
> Page 47, Transcript.

The court does not quote Mr. Paul correctly. What Mr. Paul did say is in the record. On page 5, Transcript, during the colloquy between the court and Mr. Paul, while the evidence for contempt was being gathered:

> "The Court: These allegations of the petition, you state to the Court, are made by you

upon the basis of statements made to you by Maxfield Dalton?

Mr. Paul: The facts were, your Honor, given me by Maxfield Dalton in part, and others."

Page 5, Transcript.

Peratovich, who acted as Dalton's attorney at Craig, also told Paul the facts and Paul testified fully, fairly and positively to them, at page 25-26, Transcript.

Mr. Paul prepared the petition in controversy after the fairest inquiry of Commissioner Bagley and Bob Peratovich, who represented Dalton at the Craig court; he sent that petition with these statements in it to Dalton, who had Peratovich read it to him, and then approving and saying these exact words were true, Dalton sent it back to Mr. Paul to file in court. Dalton testified to this as fully as his understanding of the English language would permit him to do.

"Q. Do you know this petition filed in this case? Do you know about it? A. Yes.

Q. Who read it to you?

A. Bob Peratovich.

Q. You feel it was all right? A. Uh-huh."

Page 23, Transcript.

Thus Dalton saw, understood, and testified before Judge Harding.

Again, Maxfield Dalton, after mature deliberation, on Feb. 25th, 1929, in his Affidavit of Prejudice directed against Judge Harding (page 84, Transcript) shows that he regarded the original petition for a Writ of Review as his own act and that the application was made through William L. Paul, his attorney, thus:

> "I, Maxfield Dalton, being first duly sworn, depose and say that I have made application through my attorney, William L. Paul, for a Writ of Review for errors of law."
>
> Page 84, Transcript.

In view of this reaffirmation, what becomes of Mr. Stabler's attempt to show that the allegations of the petition were not the statements of appellant?

The conclusion is, having due regard for the facts, that the petition is Dalton's, it was read by him, he approved it, sent it back to Mr. Paul for filing and when Judge Harding became offended at it, he fathered the petition again and asked that Judge Harding cease its consideration on account of prejudice. All this was before Judge Harding when he entered his Order Reciting Contempt on March 4.

10. FINDINGS IN SUPPORT OF THE SECOND JUDGMENT.

The findings in support of the second judgment

seem to be divided into two parts; the first part finds Mr. Paul guilty of contempt for testifying untruthfully "in the immediate view and presence of the court." Nothing is stated in this part of the findings wherein or how the testimony so forced out of Mr. Paul by the grilling of the judge on the first eight pages of the Transcript was untrue, but he is fiercely condemned for that

> "all whereof wholly failed to show that the statements and allegations of said petition, as aforesaid, were true, or that he had reason for believing the same to be true; but on the contrary showed the same to be fictitious, false and untrue; and that he had no reason for believing the same was true . . . all whereof fully appears by the transcript of said evidence, and said statement in his own behalf, and the record and files of said proceedings hereunto annexed."
>
> Page 49, Transcript.

Upon weighing the testimony of Mr. Paul, the court denounces it as untrue, in spite of the fact that the testimony of the other witnesses corroborates it—and the judge has none other before him.

The second part of the findings in the second judgment is based upon a supposed untruthful statement contained in paragraph 3 of the Affidavit of Prejudice, (page 86, Transcript), made, signed and sworn to by Maxfield Dalton, on Feb. 25th, two days after the trial for contempt, yet in

time to get into his Order Reciting Contempt which was not delivered until March 4, 1929.

The finding of Judge Harding on this branch of the case (page 50, Transcript) refers to this affidavit of prejudice as containing excessive and unnecessary allegations:

> 9. "and were wilfully false and untrue in this: that said affidavit of prejudice in which William L. Paul, acting as attorney as aforesaid stated that, "The said Hon. Justin W. Harding, during the course of said hearing and before any evidence was heard, said, 'I have reason to know these statements (referring to the contents of said petition) are untrue,' whereas, the court finds what was in truth and fact stated was as follows: 'You allege certain new matter in this petition, which is under your oath here as an attorney, which I have reason to know is not correct,' which statement was reported by the reporter and made a part of the record of the proceeding, all of which said William L. Paul then and there well knew."

Now the court is mistaken again, for he did use the exact phrase quoted in Dalton's affidavit of prejudice in paragraph 3, as a part of his effort to force Mr. Paul to come within the presence of the court and testify, at the top of page 6, Transcript.

"Mr. Paul: Of course, I don't think we

need to go as far as that. I am submitting the petition in accordance with section 1376.

The Court: I have reason to know these statements are untrue. Are you willing to call him on the stand?"

Page 6, Transcript.

So the fact is the judge used both expressions mentioned in his finding, during his remarkable examination of Mr. Paul, as shown in the first eight pages of the Transcript—on pages 4 and 6.

Whereupon, however, Judge Harding heaped many more excessive and unnecessary adjectives upon appellant's head, and fined him $100 additional, because the court did not happen to notice that he had accused the defendant twice of being an untruthful person, instead of once.

We submit that the record shows beyond doubt that the defendant correctly quoted the proper threatening phrase used by the court, calling the helpless young lawyer an untruthful person in open court before his trial had begun before the same judge, and that there is not any evidence in the record to support the finding that the wrong expression was used in the affidavit of prejudice. Wherefore this second judgment is without the support of any evidence, the court had no jurisdiction to make it, and that branch of the judgment should be reversed.

11. MR. PAUL'S ATTEMPT TO AMEND AND APOLOGIZE.

When Judge Harding called the matter up at Ketchikan on Feb. 23 the first utterance of Mr. Paul was a request for leave to amend by striking out of the petition the clause which the judge thinks constituted contempt. No answer was given to this request until the case was concluded, Page 39, Transcript. His request for a continuance and leave to prepare his defense was again made—but no answer to such requests was made by the judge who continued his grilling.

Pages 3, 6, 7, 29, 83, Transcript.

Mr. Paul had no intention to insult Judge Harding in the statements in the petition, or otherwise, and did not realize that the judge took that view of that matter until the cross-examinations and denunciations of the judge in the first eight pages of the Transcript informed him of the judge's feeling, and then sought by the most humble apologies to mollify him and cure the situation. On pages 28 and 29 Mr. Paul made these statements:

> "I made no statement that I did not believe could be substantiated by the facts. I certainly made no statement for the purpose of insulting anybody or for the purpose of belittling the court or treating it in any way that might be considered contempt, and thinking that perhaps some of the language might be

construed as such I offered and asked leave of the court to amend my complaint (petition) so that particular language might be stricken and changed. That is my statement.

The Court: That is all. I don't think he should be submitted to cross-examination in this case; he makes this statement voluntarily.

Mr. Paul: Of course I could go farther and say as long as there is to be no cross examination I am willing to say to the court if it is the Court's opinion my language is couched in words that are derogatory I am willing to withdraw them and apologize for them; and that is the purpose for which I made the motion to amend the petition and the reason I referred to it only in lines so and so of paragraph so and so, so that the language would not be public property etc. . . . and I still wish to renew the offer.

The Court: That is all."

No apology, no excuse, no continuance to amend so as to strike out the offending language was considered, no answer was made to these apologies and request, except the court said: "That is all," which was in effect a denial, and shows the feeling and intention of the judge in pressing the matter so arbitrarily.

12. THE AFFIDAVIT OF PREJUDICE.

This affidavit was not in the files or before

Judge Harding on Feb. 23, when he tried Mr. Paul for contempt. It was signed, sworn to by Dalton and certified to by Mr. Paul on Feb. 25th—two days after Dalton, in open court, heard Judge Harding denounce his attorney and his cause as is shown on the first eight pages of the Transcript. Even an Indian client with as little understanding of the court's language as Dalton had knew from what occurred there that he would not be justified in trying his case before that Judge, and Mr. Paul would have betrayed his client's cause not to have attempted to secure its trial, as he informed Judge Harding in his letter of Feb. 6 he intended to do, before another judge.

We submit that the affidavit was fairly and courteously worded and the facts in the record amply justified Dalton's action in filing it to prevent Judge Harding from trying his case. In his certificate to that affidavit Mr. Paul certified that he is the attorney for Dalton who is filing the affidavit, "and that said affidavit and application has been made in good faith." Yet Judge Harding based his second judgment of direct contempt, under the first clause of Sec. 1441, for "disorderly, contemptuous, or insolent behavior toward the judge while holding court, tending to impair its authority or to interrupt the due course of a trial or other judicial proceeding," upon that affidavit.

There is no evidence in the record that it was

presented in open court, or that it was even filed in the court or the clerk's office—there are no file marks on it and no evidence in relation to it. Certainly there is no proof of a direct contempt in relation to it—there is no evidence to show that it was intended to have that effect, and its presence in this record and its contents are not evidence sufficient to support the finding or the judgment based on it. It did not constitute contempt.

Tjosevig v. United States, 255 Fed. 5.

13. APPELLANT DENIED A TRIAL BY JURY.

Mr. Paul did not demand a jury trial under Chapter 22, Session Laws, Alaska 1925, because he was not advised at any time during the proceeding before Judge Harding that he was on trial for contempt. Had he been so advised, after being personally denounced by the irate judge for eight pages, he would have done so. The Court misled him by announcing that it was the Dalton case on trial, Pages 2 and 40, Transcript, and he was thereby lured into a false security, until the trial ended, being thereby denied a right to a jury trial.

B. POINTS AND AUTHORITIES.

Counsel respectfully submit that the real question before the appellate court in this case is whether the appellant suffered a denial of his constitutional rights to due process, to be informed of the nature and cause of the accusation, to be con-

fronted with the witnesses against him, to compulsory process for obtaining witnesses in his favor, and for time to have the assistance of counsel for his defense, and whether he was denied a fair trial on notice. If the court shall find from the record that that result followed from the action of the trial court, then we ask that the cause be reversed and the judgments against defendant be set aside as void for want of jurisdiction.

We, therefore, present that phase of the case fully.

1. ASSIGNMENTS OF ERROR RAISING CONSTITUTIONAL QUESTIONS.

Assignments numbers 1, 2, 3, 4, 5, and 6, more particularly cover the questions of denial of constitutional rights. The other assignments were intended to cover other questions of errors of law, and have been generally discussed in the consideration of the facts. None of the assignments are waived, but those relating to mere errors of law, other than the constitutional errors, are submitted on the general argument, while the following will be submitted on the more important questions.

2. HOW THE COURT MISLED THE DEFENDANT.

The record shows, quoting from Judge Harding's opening sentence in his final Order Reciting

Contempt, that:

> "On February 23rd, 1929, this matter came on for hearing before the Court in open court and in the immediate view and presence of the court, upon the petition of Maxfield Dalton for a Writ of Review, which petition was entitled 'In the matter of the Application of Maxfield Dalton for a Writ of Review,' and had theretofore, towit, on February 13, 1929, been filed by William L. Paul, etc."

Judge Harding's opening statement in this case on page 2 of the Transcript, was:

> "The Court: The application for the Writ —for an order allowing a writ of review is before the court for hearing."

Mr. Paul, attorney for Dalton, being present, arose and said:

> "Mr. Paul: I wish again to ask leave of the court to continue the case in order that I may make an amended petition, some of the language might be changed."
>
> Page 2, Transcript.

No answer was returned to this courteous request of counsel and the judge began eight pages of abuse and intimidation.

We submit that this language of the trial judge can have but one meaning—that the Dalton mater was on for hearing. Mr. Paul had no intima-

tion that he was on trial for contempt, or anything else—he was misled by the court's words. We further submit, candidly, that the only matter in the whole record fairly relating to the case of Dalton's application is the first statement above quoted from Judge Harding's announcement, and his last statement on page 39, Transcript, after Mr. Paul had been thoroughly grilled and tried, as follows:

> "The Court: I will take this matter under advisement. The request to file an amended petition for the writ will be granted. That was your application, to file an amended writ?
>
> Mr. Paul: Yes, your Honor."

Every shred of the testimony, evidence and proceedings in the record, from page 2 to 39, Transcript, relates only to and was intended to relate only to the trial of William L. Paul for contempt of Court for sending the letter of Feb. 6 with the petition for writ of review to Judge Harding in his Juneau chambers.

No notice, affidavit of merits, order to show cause, or any other process was served upon or otherwise given to Mr. Paul of this trial. He was solemnly assured by the judge from the very seat of justice that it was the Dalton case that was on for hearing.

We also call the court's attention to the statement of the trial judge above quoted—"I will take this matter under advisement"—he did and as a conclusion wrote and put in the record his Order Reciting Contempt—a judgment finding the defendant guilty of contempt on two counts!

Not only was the defendant not given notice—he was misled by the very words of the trial judge, both at the opening and at the closing of the testimony.

The trial judge announced that it was the trial of the Dalton civil case—yet the United States District Attorney took forcible charge of conducting the trial—called Dalton as the government's first witness, and before the eye of the trial judge laid the foundation of the contempt case against a helpless young lawyer against whom no charge or accusation had been laid, agreeably to the provisions of Section 1444, Comp. L. Alaska, 1913, or any other law. We submit that it was a subtle, dangerous and successful assault upon the constitutional rights of a citizen.

Whether or not this method of procedure on the part of the prosecution was intended to entrap the unsuspecting young lawyer into repeating the offending clause in the petition for a writ of review in the immediate view and presence of the judge while holding court, so as to give the court

a supposed jurisdiction and authority to punish him summarily for direct contempt under the first subdivision of section 1441, Comp. L. Alaska, 1913, is a fair matter for consideration, but that result certainly followed from the methods pursued.

Will those methods be allowed to bar the defendant from his rights under the Constitution and laws of the United States to notice and a fair trial, to time for preparation and time to secure witnesses for his defense?

3. The FIRST ASSIGNMENT OF ERRORS.

We think the various statements contained in the first assignment of errors correctly state the fair conclusions upon the facts as well as the law, and we quote them here, also, as fairly representative of the conclusions which we wish the court to reach.

I.

The court had not jurisdiction to try this cause and at no time acquired jurisdiction over the defendant as required by the Constitution and laws of the United States, more particularly the Fifth and Sixth Amendments thereof in this:

(a) The defendant's conviction was had without due process of law, in that no accusation or charge of any kind was preferred or filed against him, either by way of affidavit, or otherwise.

(b) That no notice of any proceeding against him was ever given defendant and he had no knowledge of any proceeding against him at the time of the rendering and making of the pretended judgment herein.

(c) That the record herein fails to show that the defendant, at any time, committed any offense against the laws of the United States or the Territory of Alaska.

(d) That he was denied the assistance of counsel in his defense and denied the common law right of purging himself by his oath, of contempt, if any had been committed.

Page 90, Transcript.

Fifth Amendment Constitution, U. S.

Sixth Amendment Constitution, U. S.

Cooke v. United States, 267 U. S. 517, 69 L. Ed. 767.

Michaelson v. United States 266 U. S. 42, 69 L. Ed. 162.

Craig v. Hecht, 263 U. S. 255, 68 L. Ed. 293 (301).

Hovey v. Elliott, 167 U. S. 409, 42 L. Ed. 215.

Windsor v. McVeigh, 93 U. S. 274, 23 L. Ed. 914.

Ex Parte Robinson, 86 U. S. 505, 22 L. Ed. 205.

Ex Parte Bradley, 74 U. S. 364, 19 L. Ed. 214.

The lamented District Judge who presided in the First Division of Alaska recently, in a carefully prepared opinion in the case of In re Stabler, 7 Alaska, 186, laid down the rules necessary to differentiate between the degrees of contempt under the provision of the Alaska Statute, secs. 1441-1455, Compiled Laws of Alaska, 1913. He divided contempts in this jurisdiction into two classes, which he designated as (1) "direct contempts," and (2) "constructive contempts" and said further:

> "This distinction between a direct contempt and a constructive contempt is confirmed by our statute, in that it is provided (Section 1443, Compiled Laws) that, when a contempt is committed in the immediate view and presence of the court, it may be punished summarily, for which an order must be made, reciting the facts as occuring in such immediate view and presence of the court, determining the person proceeded against is thereby guilty of contempt, and, in section 1444, that in other cases, the proceeding must be initiated by an affidavit presented to the court upon which an order may be issued to show cause, or a warrant of arrest, and in such case testimony shall be adduced, as in criminal cases."

The course of procedure followed by the prosecution in this case, and the final judgments against the appellant, can only be sustained upon the theory that the court below entertained jurisdiction to proceed against the defendant as for a "direct contempt" under the first subdivision of Sec. 1441, Comp. L. Alaska, 1913—that is for—

> First. Disorderly, contemptuous, or insolent behavior toward the judge while holding the court, tending to impair its authority or to interrupt the due course of a trial or other judicial proceeding.

It being certain that no process required by Sec. 1441—no affidavit—no order to show cause—no notice of accusation or hearing, was given to the defendant requiring him to appear before the court at Ketchikan, and defend, we respectfully submit the following propositions:

I.

That the single act of forwarding through the United States mails, from Ketchikan to the judge in his Juneau chambers, the letter of Feb. 6 with the petition in the Dalton case enclosed, did not constitute a direct contempt "of the judge while holding court."

II.

That the said letter and petition so forwarded did not constitute "disorderly behavior," or " con-

temptuous behavior" or "insolent behavior toward the judge while holding the court."

III.

That "direct contempt" under the provisions of the first subdivision of Sec. 1441 can be the basis of punishment for contempt only when it is done "toward the judge while holding the court, tending to impair its authority or to interrupt the due course of a trial or other judicial proceeding."

IV.

That such "direct contempt" can only arise when in addition to the acts constituting the direct contempt described in section 1441, it "is committed in the immediate view and presence of the court or officer."—Section 1443.

V.

That the offense, if any, perpetrated by sending the letter and petition to Jurge Harding was completed, concluded and ended when he received the letter in his Juneau chambers, for the appellant made no further move to extend that act.

VI.

That every additional act in relation to the matter subsequent to the receipt of the letter and petition by Judge Harding on Feb. 13, in his Juneau chambers, was done by those officials engaged in the prosecution of the appellant, and for their acts

he cannot under any lawful theory, be convicted for contempt.

VII.

That no word or act of appellant at his trial before Judge Harding on Feb. 23, can be classed, by any fair construction, as "disorderly behavior," or "contemptuous behavior," or "insolent behavior"—"toward the judge while holding the court, tending to impair its authority or to interrupt the due course of a trial or other judicial proceeding." His every act and word during that trial was orderly, respectful and courteous, notwithstanding the unexpected treatment and trial he met with from the prosecution.

VIII.

That the Dalton affidavit of prejudice, upon which the second judgment is based, was made and certified on Feb. 25, two days after Mr. Paul's trial on Feb. 23; he had no notice of any kind that it would be considered by Judge Harding as a ground for contempt; the finding and judgment on that ground are clearly based on a mistake by the Judge in examining the record, and the matter is so inconsequential and immaterial in character as to afford no support to the findings and judgment based thereon; and, anyway, this court has heretofore held that the filing of an affidavit of prejudice, if in respectful manner and language,

does not constitute contempt—Tjosevig v. the United States, 255 Fed. 5—and Mr. Paul relied on that adjudication in preparing it.

IX.

Wherefore, as we view the law and the facts in the case, the appellant was actually tried on Feb. 23, only for the single act of sending the letter and petition to the judge in chambers, and that without the service of any affidavit, order to show cause, notice or process of any kind.

X.

That the secrecy with which the case against appellant was prepared, and the statement of the trial judge that:

> "The Court: The application for the writ —for an order allowing a writ of review is before the court for hearing,"
>
> Page 2 and 40, Transcript.

wholly misled the defendant to his great prejudice and whereby he was drawn before the court, as he believed, in the trial of the Dalton case only, and was there actually tried for the crime of contempt, without his knowledge or any warning or notice, and was thereby (1) compelled to be a witness against himself, (2) was deprived of his liberty and property without due or any process of law, (3) was not informed of the nature and cause of the accusation against him, (4) was not con-

fronted with the witnesses against him, (5) was not allowed to have compulsory or any process for obtaining witnesses in his favor, and (6) was denied the assistance of counsel for his defense.

The leading case in the United States jurisdiction applicable to the case at bar is—

> Cooke v. United States, 276 U. S. 517, 69 L. Ed. 767.

This case seems to counsel for appellant to be on all fours with the case at bar, and to definitely settle the constitutional questions raised here. In that case, unlike this, there was some notice given to the accused, while in this there was none. There a letter was written to the judge of the U. S. District Court on Feb. 15, which contained the clause upon which the contempt was based, and we quote from the record stated in that case:

> "Eleven days after this, on the 26th of February, the court directed an order to be entered with a recital of facts, concluding as follows: 'Therefore, since the matters of fact set forth herein are within the personal knowledge of the judge of this court, that said letter as a whole is an attack upon the honor and integrity of the court, etc. . . . it is ordered that an attachment issue, etc.'" (521).

The parties were arrested and brought before the judge.

> "Mr. Clay Cooke said he had not known of the attachment until that morning, that he would like time to prepare for trial and get witnesses for their defense" etc. (522).

In the case at bar not even an attachment was issued, no notice of any kind was given, and the appellant was misled by the statement of the judge that another case was on trial, and during the whole of his trial he was not advised that he was on trial for contempt, so thereby he was lulled into a false security, though the judge was actually trying him for contempt. He had no notice that he was on trial, and was not accorded any hearing on contempt.

No act or word of contempt was done or said by appellant on that proceeding—he was tried, secretly—to him—without notice, for sending the letter of Feb. 6 with the petition to the judge in Juneau chambers. In the Cooke case, the Chief Justice said in the court's opinion:

> "Due process of law, therefore, in the prosecution of contempt, except of that committed in open court, requires that the accused be advised of the charges and have a reasonable opportunity to meet them by way of defense or explanation. We think this includes the assistance of counsel, if requested, and the right to call witnesses to give testimony relevant either to the issue of complete exculpation or in extenuation of the offense in miti-

gation of the penalty to be imposed," citing authorities. (537).

"In such a case and after so long a delay, it would seem to have been the proper practice, as laid down by Blackstone, 4 Commentaries, 286, to issue a rule to show cause. The rule should have contained enough to inform the defendant of the nature of the contempt charged. See Hollingsworth v. Duane, Wall St. 141, Fed. case No. 6617. Without any ground shown for supposing that a rule would not have brought in the alleged contemnors, it was harsh under the circumstances to order the arrest." (537).

After the court elicited from the petitioner the admission that he had written the letter, the court refused him time to secure and consult counsel, prepare his defense, and call witnesses, and this although the court itself had taken time to call in counsel as a friend of the court. The presence of the United States District Attorney was also secured by the court on the ground that it was a criminal case." (538).

And in its application to the action of Judge Harding in bringing in a new count based on the alleged filing of the affidavit of prejudice two days after the trial of Mr. Paul, and finding him guilty of a second contempt on that, the following ruling seems to be conclusive: (538)

> "On the other hand, when the court came to pronounce sentence, it commented on the conduct of both the petitioner and his client in making scandalous charges in the pleadings against officials of the court, etc. . . . It was quite clear that the court considered the facts thus announced as in aggravation of the contempt. Yet no opportunity had been given to the contemnors even to hear these new charges of the court, much less to meet or explain them, before the sentence. We think the procedure pursued was unfair and oppressive to the petitioner."

The Chief Justice concludes the opinion of the court with laying down the fair rule that when the judge is attacked by contempt, as in that case, he should call in another judge to hear the contempt (539).

> "All that we can say upon the whole matter is that where conditions do not make it impracticable, or where the delay may not injure public or private right, a judge called upon to act in a case of contempt by personal attack upon him, may, without flinching from his duty, properly ask that one of his fellow judges take his place. Cornish v. United States, 299 Fed. 283, 285; Toledo Newspaper Co. v. United States, 150 C. A. C. 636, 237 Fed. 986, 988."

In the case at bar, Judge Hill, of the Third Division, was in Ketchikan, to hold court there at the request of Judge Harding specially to try cases in

which Judge Harding was disqualified, including the Dalton case.

The Cooke case is supported in principle by the cases above cited in connection with it, but it seems to counsel for appellant to conclude every question involved, upon facts almost identical with those in the case at bar, and for that reason they are not presented in extenso.

What is due process of law, in a contempt case, is adjudicated in Hovey v. Elliott, 167, U. S. 409, 42 L. Ed. 215 (221). The sylabus reads: (417)

> "Due process of law signifies a right to be heard in one's defense," and the court said, (419) "If the power to violate the fundamental constitutional safe guards securing property exists, and if they may be with impunity set aside by the courts on the theory that they do not apply to proceedings in contempt, why will they not also apply to proceedings against the liberty of the subject? Why should not a court in a criminal proceeding deny to the accused all right to be heard on the theory that he is in contempt, and sentence him to the full penalty of the law? No distinction between the two cases can be pointed out. The one would be as flagrant a violation of the rights of a citizen as the other, the one as pointedly as the other would convert the judicial department of the government into an engine of oppression, and would make it destroy great constitutional safe guards."

The general rule is thus stated by the Supreme Court in the case of Windsor v. McVeigh:

> Wherever one is assailed in his person or property, there he may defend, for the liability and the right are inseparable. This is a principle of natural justice, recognized as such by the common intelligence and conscience of all nations. A sentence of a court pronounced against a party without hearing him, or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal.
>
> That there must be notice to a party of some kind, actual or constructive, to a valid judgment affecting his rights, is admitted. Until notice is given, the court has no jurisdiction in any case to proceed to judgment, whatever its authority may be, by the law of its organization, over the subject matter . . . A denial to a party of the benefit of a notice would be in effect to deny that he is entitled to notice at all, and the sham and deceptive proceeding had better be omitted altogether."
>
> Windsor v. McVeigh, 93 U. S. 274, 23 L. Ed. 914 (916).

And in the case of Ex parte Bradley the Supreme Court said:

> "Without pursuing this branch of the case

further, our conclusion is:

* * * *

Second: That they possessed no power to punish him, upon an exparte proceeding, without notice or opportunity of defense or explanation for misbehavior, or for any particular instance of the same generally in his office as attorney of the court, as claimed in the words of the return, 'irrespective of the doctrine of contempts.' "

Exparte Bradley 74 U. S. 374, 19 L. ED. 214 (218).

While the record in this case shows that Mr. Paul was compelled to testify and to offer his wife as a witness, the record also shows without doubt, that such testimony was extorted in the hearing of a civil case, "In the Matter of the Application of Maxfield Dalton for a Writ of Review," and not upon any charge, accusation or proceeding against him for contempt, and not upon any notice to him that any contempt case was then pending, but in which he was adjudged to be guilty and the fines inflicted.

Pages 2 and 40, Transcript.

4. THE 2nd AND 3rd ASSIGNMENTS OF ERROR.

Both these assignments seem to be covered by the argument and authorities in support of the

first assignments and will be submitted therewith.

5. THE 4th ASSIGNMENT OF ERROR.

Sec. 1539, Comp. L. Alaska, 1913, provides that a judge shall not act as such—

> "Fourth, Where he has been attorney in the action or proceeding for either party."

though the section further provides that—

> "In the cases specified in subdivisions three and four the disqualification may be waived by the parties and shall be deemed to be waived unless an application be made as provided in the code."

Mr. Paul waived this objection in so far as he requested Judge Harding to act in the matter by his letter of Feb. 6 carrying the petition to the judge in chambers in Juneau. At that time he did not know and was unsuspicious of the feeling of the judge against him (page 85, Transcript), though he did know the judge was generally disqualified, for he informed him in the letter that "I am requesting that you sign the same in order that the matter may come up before Judge Hill in March."

Judge Harding, also, had a duty to perform under the mandatory provisions of the statute of Alaska separate and apart from any duty or action of the attorney, for he knew the statute used

the words "shall not act as such" in that case, and he knew much better than Mr. Paul did at that time his own prejudice and bias in the case. It would have been in line with the spirit of the statute which gave him that command, and it would have been just and proper if he had suggested his own disqualification, and either returned the petition to Mr. Paul, without any action on it, or if he thought an intentional contempt was offered to the judge by the phraseology therein, to have instructed the district attorney to prepare an affidavit and an order to show cause, and present the matter to Judge Hill, who was then due in his district to hold court in his place in such matters. But he did not—he adopted the methods and proceedings shown in the Transcript. We submit this point without further argument, upon the mandatory words of the statute and the evident inexperience, good faith and lack of suspicion of the attorney with whom he had to deal.

6. THE 5th AND 6th ASSIGNMENTS OF ERROR.

The 5th assignment is sufficiently covered by the argument under assignment number one.

The 6th assignment is generally covered by the argument under assignment number one, except the last clause therein.

Mr. Paul requested time to go to his office and

get the correspondence which he had from Dalton about the preparation of the petition in the months of November and December, 1928. He was given 20 minutes only (page 8, Transcript), and in that time he had to be present in court to receive a verdict in a jury case where he was an attorney. At page 27, Transcript, he said:

> "I have made a search for those letters in my office but in the short time allowed by the court I am not able to produce them."
>
> Page 27, Transcript.

He requested time for preparation, etc.:

> "Mr. Paul: I am willing to be examined, but I think the court might set another time—as long as the proceeding is taking this direction—for me to prepare myself."
>
> Page 7, Transcript.

If the court had fairly granted him time to prepare himself, even in the Dalton case then said by the judge to be on trial, he would have found those letters and produced them in court. Assignment of error number six alleges error because "it appears that the allegations were prepared and signed before the then United States Attorney was appointed judge."

Page 92, Transcript.

This fact could have been shown by those letters, and would have demonstrated that the petition was not intended when it was made, signed

and certified as any contempt "toward the judge while holding the court," for he was not then judge. But that evidence was not produced at the trial owing to the refusal of Judge Harding to grant the time necessary for preparation—and it is that fact which is in the record and which we complain about. If that evidence had been found and produced it would have conclusively shown that there was no intent on Mr. Paul's part to commit any contempt of court when the petition was prepared, signed and certified, because Mr. Harding was then the U. S. Attorney, and not the Judge, and he was entitled to show that fact, but was denied the right to do so for the want of sufficient time.

Did the petition presented to Judge Harding by the letter of Feb. 6 as stated in the record, constitute contempt "toward the judge while holding the court, tending to impair its authority or to interrupt the due course of a trial or other judicial proceeding"? We think not. It was a mere pleading, and the clause objected to by Judge Hardin was a necessary allegation to a good pleading and contained no charge of any offensive character against the judge while holding court or at all. Is the judge treated contemptuously when only the United States Attorney was mentioned? Did the words used tend to impair the authority of the court? Certainly not. Did they tend to interrupt

the due course of a trial? Certainly not.

We candidly submit to the court that the defendant was denied the right to notice, to due process of law, to be informed of the nature and cause of accusation, to have time to prepare, to process for witnesses, and to the assistance of counsel for his defense, and we respectfully submit this brief trusting that our views may meet with the approval of this court.

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